

IN THE

SUPREME COURT OF THE UNITED STATES, JR., CLERK

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October Term, 1976

No. 76-5856

WINSTON M. HOLLOWAY,
RAY LEE WELCH, and
GARY DON CAMPBELL,
Petitioners,

v.

STATE OF ARKANSAS,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF ARKANSAS

BRIEF OF THE NATIONAL LEGAL AID AND
DEFENDER ASSOCIATION AS AMICUS CURIAE

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**BRIEF OF THE NATIONAL LEGAL AID AND
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INTEREST OF N.L.A.D.A. AS AMICUS CURIAE

(1) The National Legal Aid and Defender Association (N.L.A.D.A.) is a not-for-profit organization whose primary purpose is to assist in providing effective legal services to the poor. Its members include the great majority of defender offices, coordinated assigned counsel systems, and legal aid societies in the United States. The Association also includes four thousand individual members, most of whom are private practitioners.

(2) The interest of N.L.A.D.A. in this case is limited to the first issue raised in the petition for writ of certiorari. This issue relates to the refusal of the trial court to grant the petitioners' and public defender's request to have separate counsel appointed to represent each of the three defendants. On appeal, the Arkansas Supreme Court affirmed the trial court's action, three justices dissenting.

(3) Members of N.L.A.D.A., as both public defenders and publicly compensated, assigned, private counsel, are often placed in the same situation as counsel in the instant case. Publicly compensated counsel are often required to represent multiple defendants due to the high cost of providing separate counsel to each defendant. It is the vehement position of N.L.A.D.A. that to deny the request to designate separate counsel for each defendant not only denies each defendant his or her constitutional right to effective representation by counsel, but also places the assigned attorney in the position of being required by the appointing court to engage in unprofessional conduct which would not be proper or acceptable in the case of a privately retained lawyer.

(4) N.L.A.D.A. has received the consent of both parties for the filing of this brief.

SUMMARY OF ARGUMENT

I.

The National Legal Aid and Defender Association submits that the trial court's denial of defendants' request to be represented by separate counsel denied each of the defendants his constitutional right to counsel in at least four specific respects. Initially, the multiple representation by Mr. Hall precluded him from pursuing vigorously effective pretrial negotiations on behalf of any of his

clients. Secondly, such multiple representation made it difficult to investigate the case on behalf of all three defendants and impossible to disclose facts to one defendant if gained through a confidential interview with another of the defendants. The fact that Mr. Hall was required to represent all three defendants at trial made it impossible for him to cross-examine any of his clients on behalf of his other clients and to protect the rights of each of his clients while conducting direct examination of any one defendant. Such multiple representation also constituted a denial of effective representation to each of the defendants in relation to sentencing.

The combination of these, and other, factors resulted in the defendants being denied effective representation at trial, and thus the judgment of the Arkansas Supreme Court must be reversed.

II.

It should not be necessary for an attorney, acting in good faith, to disclose to the trial judge the specific, factual basis of the conflict of interests between codefendants. Under the Code of Professional Responsibility the issue is not whether there is an actual conflict, but whether counsel's loyalty and judgment on behalf of any client is diluted because of the necessity of multiple representation. Moreover, it is often impossible for counsel to specify the exact facts which constitute the basis for the conflict until the eve of trial, thereby resulting in undesirable delays in proceeding.

N.L.A.D.A. asserts that requiring an attorney to reveal information gained in confidence from a criminal defendant to the trial judge, either in the presence of the prosecution or *in camera*, would be inherently prejudicial to such defendant because such information would be used by the

prosecution against all or some of the defendants and could influence the court at the time of sentencing, consideration of pretrial suppression motions, or other points in the trial.

III.

It is the fundamental position of N.L.A.D.A. that the decision of whether a conflict exists must be left to the defense attorney after advising his clients of their rights and of any possible or actual conflicts. Even where there is a conflict, the defendants can waive such problems and elect to be represented by the same attorney, and under no circumstances can a court order a defendant to obtain or accept separate counsel when the defendants waive the right to be represented by different attorneys.

ARGUMENT

I. Each Defendant Was Denied His Constitutional Right To Effective Representation By Counsel By Virtue Of Assigned Counsel's Belief That There Was A Conflict Among The Three Defendants.

The N.L.A.D.A. believes that the ultimate issue involved in this case is whether defendants' trial attorney was obligated to specify to the trial court what specific conflicts existed among his three clients which prevented him from providing effective representation to all three men at trial. While *amicus* will deal with this question in the second section of this brief, this issue is also involved with the concept of an attorney's ability to provide effective representation to anyone when he or she believes there is a

conflict of interest, assuming that counsel is proceeding in good faith.¹

Effective representation under the constitution involves much more than simply appearing in court and conducting examination and cross-examination. Frankly, it is not always possible from reviewing a court record to determine whether a defendant was afforded effective representation. That is especially true in the instant case wherein counsel may well have deferred taking some action on behalf of one client because of his obligation to other clients. This is particularly true in several specific respects.

A. Counsel's perception would have precluded effective pretrial negotiation.

An effective defense counsel has the *duty* to explore disposition without trial whenever he or she believes that the facts and circumstances warrant such negotiation. American Bar Association Project on Standards for Criminal Justice, *Standards Relating to the Defense Function*, Standard 6.1. In codefendant cases it is not at all unusual for the prosecution to offer a reduction of the charge against one defendant in return for that defendant's testimony against the others. Indeed, a competent defense counsel would pursue such agreement after reviewing the facts and determining that either one defendant was

¹ *Amicus* makes this assumption throughout this brief, and notes that the Arkansas Court referred to counsel as "a very honorable man and competent lawyer," *Holloway v. State*, 539 S.W. 2d 435, 441 (Ark. 1976). *Amicus* recognizes that the result might well be different if a request for change of counsel was made in an effort to delay proceedings or impede justice.

clearly less culpable than the others, had a less substantial prior record, or was in a better strategic position than the other defendant(s). Here, however, Attorney Hall was precluded from seeking such an arrangement because he would, in effect, be supplying the prosecution with evidence against his own client. He could hardly go to the prosecutor and offer to have defendant "A" turn State's evidence against defendants "B" and "C" if he was representing all three men at the same time. In view of the conflict inherent in the situation, the *proof* of such ineffective representation could not be shown because the conflict in and of itself precluded entry into such negotiations and the development of the complete record.

B. Counsel's representation of codefendants precluded him from disclosing all of the facts known to him about the offense.

A defense counsel has the obligation not only to investigate the circumstances of the case, *A.B.A. Standards Relating to the Defense Function*, Standard 4.1, but to inform his client of all the developments in the case, *ibid.*, Standard 3.8. Counsel's obligations to the defendant are the same whether he has been appointed or retained, *ibid.*, Standard 3.9. The first thing any attorney would do to investigate the offense is to take a detailed, confidential statement from his or her client(s). It at once becomes apparent that counsel cannot share the facts learned from defendant "A" with defendants "B" or "C" and vice versa. In the instant case, for example, defendant Campbell asserted that he was under the influence of drugs and alcohol at the time of the offense. If this is true, it is entirely possible that defendants Holloway and Welch would know more about Campbell's involvement than Campbell himself. If counsel gained knowledge of Campbell's involvement from Welch or Holloway, he could not share

that information with Campbell. It might well be that the codefendants would be the only people who would be able to exonerate Campbell, but counsel would be precluded from informing Campbell of such confidential information.

Similarly, counsel is placed in a very difficult position to investigate leads provided by one client which may incriminate or exonerate another of his clients. For example, defendant "A" provides counsel with information which, when investigated, reveals that "A" is actually not guilty, but defendant "B" was involved. Conversely, the information supplied by "A" might turn out to actually be adverse to him, but helpful to "B" and/or "C". In either case counsel would be restricted from commingling the information because it has been gained in the course of three separate attorney-client relationships.

For reasons which will be developed below, it is not appropriate for counsel to inform the trial court of this conflict when it does exist, but often the conflict itself will prevent or, at the very least, deter counsel from pursuing areas of possible conflict so he cannot actually be certain what additional interviews and investigation would reveal. Such a conflict almost certainly will "chill" counsel's vigorous representation. He will tread lightly when interviewing one client for fear that client "A" will say something about "B" or "C".

In the instant case each defendant moved, *prior to trial*, for both severance and the appointment of separate counsel. It is apparent that early in the proceedings the conflict became apparent to counsel and his clients, the petitioners. The conflict itself, even without the showing of specific instances of conflict, was of such a nature as to deny each defendant his right to vigorous, zealous, and independent counsel who would investigate all of the facts, inform his client of all the circumstances surrounding the

case, and ultimately assist that client in deciding how to plead and how to approach the case.

C. The enforced representation of all three defendants by a single public defender denied each defendant effective representation at trial.

The Arkansas Supreme Court concluded that the defendants were not prejudiced by being represented by a single attorney for the following reasons:

"... all three appellants voluntarily took the stand, *against* the advice of counsel, and denied any involvement in the crime. Most important, however, *none* of the appellants attempted to incriminate any of the others. Campbell completely denied making the statement to the officers, and denied even knowing Holloway at all. Holloway and Welch both stated that they knew nothing about the case," at 539 S.W. 2d 441 (original emphasis).

The N.L.A.D.A. submits that this analysis is inadequate for several reasons. It assumes that the only type of conflict would be if one defendant incriminated the other(s). This, we submit, is the critical flaw in the state court's reasoning. The Arkansas Court assumed that the defendants were either all guilty or all not guilty, but those are certainly not the only alternatives. Let us assume, for example, that Holloway and Welch *really* had no involvement with the offense, but that Campbell did. Holloway and Welch would be in no position to incriminate Campbell because they do not know anything about the offense, nor would Campbell incriminate the others because he denies any involvement in the offense. In the

course of his investigation and preparation for the case, counsel may have discovered many inconsistencies in Campbell's story and may have ascertained evidence which would tend to make Campbell's story appear less credible. Clearly defense counsel would be in no position to cross-examine Campbell on these matters at trial. Moreover, since Campbell's confession inculpates both Holloway and Welch, counsel for those defendants has an obvious interest in, first, casting doubt upon Campbell's credibility and, second, demonstrating some motive on Campbell's part to falsely involve the other two men.

The old adage about there being no honor among thieves has enough validity to allow one to note that often codefendants will assert that the other defendant who involved them has ulterior motives. This is exactly the type of conflict which could not be identified prior to trial because cross-examination of witnesses regarding prior inconsistent statements, prejudicial motives, and adverse evidence is a trial function, and would be highly diluted if counsel went over with his client those areas in which he will cross-examine his client on behalf of a second or third client.

Indeed, that is precisely what happened in this case. Mr. Hall informed the trial court that he was unable to protect all of his clients' rights and that he could not cross-examine his own clients, *see* 539 S.W. 2d 442-443.

The result of the trial court's action in this case was to virtually require that the jury reach the same verdict as to each defendant. Due to the nature of the representation afforded the defendants they were each unable to develop facts adverse to the other defendants, to cross-examine the other defendants, or to advance any claim which might exonerate one or two defendants without exonerating all three. Counsel was placed in an irreconcilable position, and

he should not have been required to represent all three defendants. The result was that all three defendants were denied the zealous, independent, and professional skills to which they are entitled under the Sixth and Fourteenth Amendments to the Constitution.^{/2}

D. The defendants were each denied effective representation in relation to sentencing.

Under the law in effect at the time of the offense involved in this case, the petitioners received the maximum sentences. Under Arkansas law a person convicted of robbery could be sentenced to a term not less than 3 nor more than 21 years in prison, *Arkansas Criminal Code*

^{/2} N.L.A.D.A. would also suggest that the fact that Campbell gave a confession involving the other two defendants, while the other two gave no statement, warranted appointment of separate counsel for much the same reasons as those which underlie the Court's decision in *Bruton v. United States*, 391 U.S. 123 (1968). There this Court reversed a conviction finding that Bruton had been denied his right to confrontation when his codefendant's statement, which inculpated Bruton, was introduced at a joint trial, when Bruton did not testify at trial. Here Holloway and Welch were equally denied their right to confrontation to attack that part of the confession involving them, while suggesting that Campbell himself, or with other unknown persons, committed the offenses. The defendants were thus not only provided ineffective counsel, but were also denied confrontation of either of the other defendants and the right to cross-examine the other defendants. They were forced to "hang together."

(1975), Sec. 41-3602. It is apparent that the jury^{/3} did not differentiate between the defendants as to penalty or as to culpability. The N.L.A.D.A. respectfully submits that by refusing to appoint separate counsel for each defendant, the courts below denied the defendants effective representation at the time of sentencing.

This precise question was considered by the California Supreme Court in *People v. Chacon*, 69 Cal. 2d 765, 775, 73 Cal. Rptr. 10, 447 P. 2d 106 (1968), where Mr. Justice Traynor, writing for the Court, observed:

"Conflicts of interest necessarily exist when the jury must fix the penalty for more than one defendant. Often the strongest argument that separate counsel can make on the issue of penalty is that his client was less culpable than the others and that he, at least, should not be executed. In addition, he must be free to stress particular mitigating elements in his client's background or other individual mitigating factors that may not apply to a codefendant. Counsel representing more than one defendant is necessarily inhibited in making such arguments and in presenting evidence to support them. He cannot simultaneously argue with any semblance of effectiveness that each defendant is most deserving of the lesser penalty."

^{/3} Under applicable Arkansas law, the jury fixes sentence, and the trial court intervenes only in the event the jury is unable to agree on the punishment, *Arkansas Criminal Code*, Secs. 43-2145-2146, 43-2306 (1975).

It is also relevant to consider the statement of the Wisconsin Supreme Court in *Hall v. State*, 63 Wis. 2d 304, 313, 217 N.W. 2d 352 (1974), on the question of the prejudice which might attach to having one attorney represent more than one defendant at sentencing:

"It is indeed true, as the state asserts, the record does not demonstrate any actual prejudice. Had the representation been fully effective and by separate counsel, the court might well have imposed the same sentence, but as the California court said in *People v. Gallardo* (1969), 269 Cal. App. 2d 86, 90, 74 Cal. Rptr. 572:

'[I]t is usually the very error of not appointing separate counsel which makes it so difficult for the defendants to point to tangible evidence of prejudice.'

In the instant case it would clearly have been impossible for defense counsel to suggest to the jury that one defendant was more culpable than any other. By requiring that Mr. Hall represent all defendants, the courts below restricted his ability to vigorously argue mitigation in relation to sentencing, and thus denied the defendants their right to effective representation at that critical stage of the proceedings, *Mempa v. Rhay*, 389 U.S. 128 (1967).

II. It Is Neither Necessary Nor Appropriate For Defense Counsel To Identify The Conflict Of Interest To The Trial Court Before The Defendants Are Entitled To Representation By Separate Counsel.

A. The issue is the attorney's honest, but subjective, belief.

A review of the Code of Professional Responsibility adopted by the American Bar Association reveals that an attorney's *obligation* is to withdraw from a case when he believes that there is a conflict between representation of multiple clients. It is clear from a reading of the Ethical Considerations relating to Canon 5 of the Code of Professional Responsibility that no actual conflict is required:

"Interests of Multiple Clients

EC 5—14 Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.

EC 5—15 If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or con-

tinues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially.

...

EC 5—17 Typically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent co-defendants in a criminal case . . .”

The N.L.A.D.A. strongly believes that the ethical obligations of public defenders and assigned counsel are exactly the same as privately retained counsel, and that our clients are entitled to the same type of independent, professional judgment as a wealthy person who is able to retain an attorney.

With this in mind, it is at once apparent that the Arkansas Court's suggestion that defense counsel allow the trial court to determine whether there is an actual conflict is not appropriate. The issue is not whether a judge would find an actual conflict, but whether counsel honestly believes that representation of multiple defendants “will adversely affect his judgment on behalf of or dilute his loyalty to a client.” Only the attorney him- or herself is able

to answer that question. All the reviewing court can do is make a factual determination that there is no actual conflict such as to require appointment of separate counsel. That should not be the issue. Indeed, the California appellate court reached this precise result in *Uhl v. Municipal Court*, 37 C.A. 3d 526, 112 Cal. Rptr. 478 (1974), wherein the Court concluded that when a public defender gives a trial court his assurance that a conflict exists among defendants that he or she need not inform the court of the factual nature of the conflict. The California Court further found that such multiple representation by one public defender raised not only serious constitutional questions, but ethical problems as well which precluded such multiple representation.

B. It is often impossible to identify specific conflicts until very near the date of trial.

As suggested in the initial section of this brief, often an attorney will refrain from pursuing an investigation or interview because of the inherent conflict which may exist between defendants. The possible conflict will deter counsel from pursuing some lines of defense and some areas of investigation because of the latent conflict of interest. Moreover, it is likely that actual conflicts may not arise until very near the scheduled date of trial at which time the prosecutor begins to seriously consider offering a reduced charge to one defendant, or when one defendant begins to change his story in the hopes of gaining some new consideration. It is at the period immediately prior to trial that defense counsel is going to spend the most time on witness preparation, investigation, and development of strategy.

Adoption of the process identified by the Arkansas Court would result in many trials being delayed precisely because of the need for an eleventh-hour change of counsel.

Such a result not only constitutes a denial of such defendants' right to a speedy trial, but violates the public's right to have criminal cases promptly disposed of.

C. Revelation of any confidential information would be a gross violation of an attorney's ethical obligations.

The most obvious response to the argument that defense counsel is obligated to inform the court of the factual basis for his claim of privilege is that such a rule would almost certainly require the attorney to violate the confidences and secrets of a client, in specific violation of Canon 4 of the Code of Professional Responsibility. Even recognizing that an exception to the rule is that "A lawyer may reveal . . . confidences or secrets when . . . required by court order," DR 4-101(C)(2), it is not at all clear that this exception covers the instant facts. Even if it does, however, such requirement would completely destroy the attorney-client relationship which the privilege is designed to foster.

Adoption of the procedure specified by the Arkansas Court would relegate court-assigned counsel to a different level of representation. It is bad enough that public defenders are often considered second-class lawyers by our clients, and often perceived as being part of the prosecutorial system. Under the Arkansas Supreme Court's decision, a court-appointed attorney can never be certain in a multiple defendant situation whether or not the information he has received from a client will remain confidential.

D. Disclosing information to the court would be inherently prejudicial to the defense.

1. If done in open court, in the presence of the prosecution.

In most situations the conflict which arises is either that one defendant implicates another or that the culpability of one defendant is vastly less or greater than the others. There might also be conflicting defenses. In a rape case, for example, one defendant might assert "consent" as a defense, while the second might assert he was not involved at all. In any of these situations it seems difficult to believe that defense counsel would be required to inform the prosecution of such confidential information. It would place defense counsel in the position of proving the State's case, or providing the prosecution with substantial ammunition to attack the defendants' case. Under any circumstances the prosecution cannot be allowed to ascertain the basis for counsel's request to withdraw.

2. If done *in camera*.

Even if the prosecution does not know of the confidential information which forms the basis for an assertion of conflict, the defendant is prejudiced simply if the trial judge is aware of the factors which lead counsel to seek withdrawal. The most obvious problem is that in most jurisdictions the judge will ultimately pass sentence upon the defendants and will quite likely be influenced if defense counsel has informed the court that one of the defendants is more or less culpable than the others. A court would certainly consider the culpability of each defendant in passing sentence. If counsel has informed the court that one of his clients is more responsible for the offense than the other defendants, this will almost certainly enter into

the court's consideration at the time of sentencing. Thus, confidential information given under the assumption of the attorney-client privilege is being used directly against one or more of the defendants.

Secondly, the confidential information may reflect on one of the defendant's credibility in a situation, as the present case, in which the court is called upon to make a factual determination which depends on a credibility determination. In this case the judge made a determination that the statement of Campbell was admissible at trial, and the Arkansas Supreme Court indicated in its decision that such a determination "posed an issue of credibility for the trial court," at 539 S.W. 2d 441.

In the course of a trial there are many points at which the judge's knowledge of confidential information gained from defense counsel, which may include knowledge of the defense strategy and the weaknesses of the defense case, will have a bearing on the court's ruling on evidentiary objections, procedural points, and the like.

The fairest judge is still human. He or she cannot forget the information provided *in camera*. There is a basic prejudice to the defendant by this procedure.

E. Such a procedure would make appellate review impossible.

In conclusion, N.L.A.D.A. submits that it would be virtually impossible to have appellate review of a decision denying the appointment of separate counsel if the defense counsel is to provide the trial court *ex parte in camera* information on the facts underlying his request for the appointment of counsel. Even assuming that it is somehow possible to make a record on the factual basis and to transmit the record under seal to the appellate state court

or the federal court for collateral review, how can the case be briefed or decided? Obviously counsel for the State could not have access to the confidential information because there would be the possibility of a new trial in the event the appellate court reversed, and thus the review would have to be, again, *ex parte* and *in camera*. The appellate court could not issue a decision because to do so would again violate the confidences involved. Even if the appellate court affirmed the trial court's decision, the information would still be confidential and could not be set forth in any public document.

III. No *Per Se* Prohibition Is Advocated, But The Decision Should Rest With Counsel And Defendant.

N.L.A.D.A. does not advocate a rule whereby any attorney would be prohibited from representing multiple defendants in a criminal action. In fact, we strongly oppose such a determination. Rather, we agree with the Court of Appeals for the Seventh Circuit "that the primary responsibility for the ascertainment and avoidance of conflict situations must lie with the members of the bar," *United States ex rel. Robinson v. Housewright*, 525 F. 2d 988, 994 (7th Cir. 1975). Similarly N.L.A.D.A. does not seek adoption of the rule of *Lollar v. United States*, 376 F. 2d 243 (D.C. Cir. 1967), which places the burden to determine conflict upon the trial judge; again, we oppose the rule of the District of Columbia Circuit.

The basic position of N.L.A.D.A. is that the duty to ascertain conflict is on defense counsel. If counsel believes that there is a conflict, or potential conflict, he is obligated to disclose such a conflict to each defendant. Unless each defendant waives his right to separate counsel, the appointing court must then appoint separate counsel at the request of the attorney without the need for further

inquiry. The defendants may, however, waive their rights to be represented by separate attorneys.⁴

N.L.A.D.A. submits that the court cannot force an attorney to withdraw from a case in which both the attorney and defendant(s) have waived any potential conflict.⁵ N.L.A.D.A. would, therefore, support the very recent decision of the New Jersey Supreme Court in *State v. Land*, March 25, 1977, 21 Cr. L. 2107, 2108:

"In all cases where an attorney represents more than one defendant, the trial court ought to advise the parties of their constitutional right. This should be accomplished as soon as the trial court is alerted to the existence of multiple representation and feasibly may bring the matter to the attention of the

⁴ In accord: *Campbell v. United States*, 352 F. 2d 359 (D.C. Cir. 1965); *United States v. Garcia*, 517 F. 2d 272 (5th Cir. 1975); *United States v. Armedo-Sarmiento*, 524 F. 2d 591 (2nd Cir. 1975); *United States ex rel. Hart v. Davenport*, 478 F. 2d 203, 211 (3rd Cir. 1973); *United States v. Foster*, 469 F. 2d 1, 4 (1st Cir. 1972); *Larry Buffalo Chief v. South Dakota*, 425 F. 2d 271 (8th Cir. 1970); and *Craig v. United States*, 217 F. 2d 355 (6th Cir. 1954).

⁵ A court may have more power to order separate counsel, over a party's objection, when the question is representation before a grand jury rather than trial representation, see *Pirillo v. Takiff*, 341 A. 2d 896 (Pa. 1975), appeal dismissed, cert. denied, 352 A. 2d 11 (Pa. 1976), appeal dismissed, cert. denied, 96 S. Ct. 873; *In re: Investigation Before the April 1975 Grand Jury*, 531 F. 2d 600 (D. C. Cir. 1976).

defendants and counsel. The defendants may waive those rights, but the trial judge must make certain on the record that the defendants understandingly and knowingly have decided to forego separate counsel."

This properly puts the initial burden on the attorney and the defendants. When counsel and/or the defendants request separate counsel, that request should be granted as a matter of course.

CONCLUSION

For the reasons set forth herein, the National Legal Aid and Defender Association submits that the failure of the courts below to require separate counsel to represent each defendant resulted in each of the petitioners being denied his constitutional right to effective representation by legal counsel. For this reason N.L.A.D.A. supports petitioners' request that the judgment of the Arkansas Supreme Court be reversed and the cause remanded with directions to grant the petitioners separate counsel at new trials.

Respectfully submitted,

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